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88-1057

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

NEC AMERICA, INC.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Are the conclusions of law adopted by the Court of Appeals for the Federal Circuit in its opinion below contrary to those previously reached in every other federal decision involving similar questions of law?

2. Was the failure of the Court of Appeals for the Federal Circuit to consider and decide the central issue in this case a far departure from the accepted and usual course of judicial proceedings?

PARTIES TO THE PROCEEDINGS

NEC AMERICA, INC.,

Petitioner,[1/]

vs.

THE UNITED STATES,

Respondent.

[1/] The petitioner is a wholly owned subsidiary of NEC Corporation in Japan.

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No. _____

IN THE
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OCTOBER TERM 1988

NEC AMERICA, INC.,
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v.
THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, Appeal No. 88-1258, which is reproduced in the Appendix at p. A-1, adopts the holding of the earlier case involving the same merchandise in NEC America, Inc. v. United States, 596 F.Supp. 466, 8 CIT 184 (1984), aff'd, adopting the trial court opinion,

760 F.2d 1295 (Fed. Cir. 1985) (hereafter NEC I).[1/]

The trial court's opinion, 681 F.Supp. 862 (1987), is reproduced in the Appendix at p. A-4.

The appellate opinion in NEC I is reproduced in the Appendix at p. A-26.

The trial court's opinion in NEC I is reproduced in the Appendix at p. A-28. Necessary to its decision, the trial court made the following conclusions of law:

1) "radio receiver" in item 685.24, TSUS, is an eo nomine designation without limitations and therefore includes all forms of the article, and

2) the common meaning of "radio receiver" includes all devices which perform the functions of selection, amplification

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[1/] The doctrines of res judicata and collateral estoppel do not apply in customs classification cases. United States v. Stone & Downer Co., 274 U.S. 225 (1927).

and detection.

It is respectfully submitted that these conclusions are contrary to every other decision on similar questions of law previously handed down by either the United States Court of Appeals for the Federal Circuit or the United States Court of International Trade or their predecessor courts.

JURISDICTION

The date of the judgment of the Court of Appeals for the Federal Circuit sought to be reviewed is September 28, 1988. It was entered on the same day. The mandate was entered on October 19, 1988. They are reproduced in the Appendix at p. A-59.

This Court has jurisdiction to review this case pursuant to 28 U.S.C. Section 1254(1).

THE STATUTORY PROVISIONS INVOLVED

Tariff Schedules of the United States, 19 U.S.C. Section 1202 (1982))(hereafter TSUS):

"GENERAL HEADNOTES AND RULES OF INTERPRETATION

10. General Interpretative Rules. For the purposes of these schedules - -

* * * * * * * * * * * * * * * * *

(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:

(i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;

(ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., between the primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading;

THE STATUTORY SCHEME FOR RADIO-TELEGRAPHIC AND RADIOTELEPHONIC RECEPTION APPARATUS, AND RADIO-BROADCASTING AND TELEVISION RECEPTION APPARATUS

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and parts thereof:

Television apparatus and parts thereof:

* * * * * * * * * * * * * * * * * * * *

Other:

Solid-state (tubeless) radio receivers:

685.21 [As classified] — Designed for motor-vehicle installation.....

685.24 — Other.....8.8%

* * * * * * * * * * * * * * * * * *

685.26 — Low-power radiotelephonic transceivers operating on frequencies from 49.82 to 49.90 megahertz.....

Other:

685.27 — Citizens Band (CB) transceivers (except hand held)...

685.29 — Other.....

685.31 — Radiotelegraphic and radiotelephonic transmission and reception apparatus, if certified for use in civil aircraft (see headnote 3, part 6C, schedule 6).....

STATUTES

685.60 Radio navigational aid apparatus, radar apparatus, and radio remote control apparatus, all the foregoing and parts thereof.....

[As claimed]

685.70 *** indicator panels, *** and other sound or visual signalling apparatus, all the foregoing which are electrical, and parts thereof.....3.5%"

STATEMENT OF THE CASE

This case involves the proper classification in TSUS of imported items described on the invoice as paging receivers, Model No. R3D3-1A and identical to Plaintiff's

Exhibit 1 in NEC I. The paging receivers are small electrical devices which are preset to a certain radio frequency channel between 138 to 174 megahertz. They have a liquid crystal diode visual display (LCD) unit with a ten digit capacity. When an encoded radio signal is received by the pager, it is decoded and activates the pager to generate a tone and to display numerical information on the LCD.

As in NEC I, these display pagers were classified under the inferior heading for "other solid-state (tubeless) radio receivers" under item 685.24, TSUS, as modified.

Petitioner contends that item 685.24, TSUS, is limited by its immediately superior heading which does not provide for these display pagers. Following Congress' instructions contained in General Headnote and Rules of Interpretation 10(c)(i), TSUS,

these display pagers cannot be classified under the inferior heading of item 685.24, TSUS.

Instead, petitioner contended that these display pagers are properly dutiable under the eo nomine designation for "indicator panels" and other sound and visual signalling apparatus which are electrical under item 685.70, TSUS, as modified, which item number has no limiting superior heading. However, failure to prove the correctness of this contended classification is not fatal to petitioner's case. As pointed out in Jarvis Clark Co. v. United States, 733 F.2d 873, 878 (Fed. Cir. 1984), petitioner's burden is only to prove that the government's classification is incorrect.

The trial court herein reiterated the conclusions of law in NEC I and held that that case was stare decisis of the present action. The Court of Appeals for the

Federal Circuit concluded that the holding in NEC I was not erroneous.

The superior heading for item 685.24, TSUS, provides for four different types of receiving apparatus, i.e. radiotelegraphic, radiotelephonic, radiobroadcasting, and television. Opposing counsel admitted in his answer to the complaint in the present case that the display pagers are not radiotelephonic, radiobroadcasting, or television receiving apparatus. Thus, the central issue in the courts below as agreed to by opposing counsel was whether the display pagers are radiotelegraphic receiving apparatus.

This issue was not considered or decided in either NEC I or the present case.

The trial court in NEC I and the present case had jurisdiction to hear the cases pursuant to 28 U.S.C. Section 1581(a).

REASONS FOR GRANTING THE WRIT

I

THE TWO ERRONEOUS CONCLUSIONS OF LAW IN NEC I AND THE PRESENT CASE ARE CONTRARY TO EVERY OTHER DECISION PREVIOUSLY HANDED DOWN BY THE FEDERAL COURTS, AND THESE ERRORS ARE NOW BEING PERPETUATED IN SUBSEQUENT DECISIONS IN THE FEDERAL COURTS

Contrary to the holding in NEC I and the present case, the eo nomine designation for "solid-state (tubeless) radio receivers" in the inferior heading of item 685.24, TSUS, cannot include all forms of radio receivers as Congress has made clear by General Headnote and Rules of Interpretation 10(c)(i) that such inferior headings are limited by the immediate superior heading. See United States v. The Corborundum Company, 536 F.2d 373 (CCPA 1976), where the superior heading for "ferroalloy" limits the inferior designation for "ferrosilicon"; United States v. Corning Glass

Works, 586 F.2d 822 (CCPA 1978), where the superior heading for "optical measuring or checking instruments" limits the scope of inferior items 710.86 - 710.90, TSUS; Schott Optical Glass, Inc. v. United States, 612 F.2d 1283 (CCPA 1979), where the superior heading for "optical glass in any form" limits the inferior heading for "other optical glass"; Dow Chemical Co. v. United States, 647 F.Supp. 1574 (1986), appeal dismissed No. 87-1041 (Fed. Cir. 1986), where the inferior provision for "light oil" is limited by the superior heading to light oil "found naturally in coal tar, whether produced or obtained from coal tar or other sources"; and Austin Chemical, Inc. v. United States, 659 F.Supp. 229 (1987), where the eo nomine provision for "mandelic acid" is limited by the superior heading for "drugs".

In addition, the holding of the courts in NEC I and the present case that all receivers that perform the functions of selection, amplification and detection fall within the common meaning of "radio receivers" flies in the face of previously judicially defined common meaning of "radio" receivers" as well as the obvious intent of Congress. See Symphonic Electronics Corp. v. United States, 72 Cust. Ct. 211 (1974); Symphonic Electronics Corp. v. United States, 77 Cust. Ct. 147 (1976); Audiovox Corp. v. United States, 1 CIT 136 (1981); and General Electric Company v. United States, 525 F. Supp. 1244 (CIT 1981), aff'd, adopting the trial court opinion, 681 F.2d 785 (Fed. Cir. 1982), wherein all of these cases held that the common meaning of a radio receiver requires a tuner and audio amplifier, citing the Encyclopedia Britannica, 1970 ed., Vol. 11, pp. 485-86.

Furthermore, from the very statutory scheme of things, Congress does not intend that every receiver that performs the functions of selection, amplification and detection is to be considered within the common meaning of radio receivers.

It was stipulated between counsel that radar, radio navigational equipment, and radio remote control devices such as automatic garage door openers perform the functions of selection, amplification and detection. Yet Congress did not intend that these articles be considered within the common meaning of "radio receivers", as Congress provided for them under a separate superior heading in item 685.60, TSUS. Similarly, television receivers, which also perform the functions of selection, amplification and detection are not listed by Congress in TSUS as radio receivers but as television apparatus and parts.

Unfortunately these erroneous conclusions of law are being perpetuated in subsequent decisions to the public detriment. See Channel Master, Div. of Avent, Inc. v. United States, 648 F.Supp. 10 (1986), reh'g denied, 674 F.Supp. 872 (1987), wherein the court said:

> "A radio receiver, as that term is used in the tariff schedules, is an eo nomine designation for an article which has been lexicographically and judicially defined as capable of performing three basic functions: selectivity, amplification, and detection. See NEC America, Inc. v. United States, 8 CIT 184, 187, 596 F.Supp. 466, 470 (1984), aff'd, 760 F.2d 1295 (Fed. Cir. 1985); General Electric Co. v. United States, 2 CIT 84, 90, 525 F.Supp. 1244, 1248 (1981), aff'd, 69 CCPA 166, 681 F.2d 785 (1982). Absent contrary legislative intent, an eo nomine designation includes all forms of the article. B & E Sales Co. v. United States, 9 CIT ____, Slip Op. 85-22 (1985)."

The decision below should be reviewed by this Court to resolve this conflict of

opinion and authority on these two conclusions of law.

II

THE FAILURE OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT TC CONSIDER AND DECIDE THE CENTRAL ISSUE INVOLVED IN NEC I AND THE PRESENT CASE IS A FAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

As stated by opposing counsel in his appellate brief, the central issue in the present case is whether the display pagers are radiotelegraphic receivers. If they are not, then the display pagers are not included in the superior heading for the inferior heading for "solid-state (tubeless) radio receivers" and cannot then be classified under that inferior heading.

Yet neither the trial court nor the Court of Appeals for the Federal Circuit in NEC I and the present case decided, or

much less made any mention of, whether the display pagers came within the common meaning of radiotelegraphic receivers.

Certainly the appellate court's refusal to consider and decide the issue which counsel for both sides consider to be the central issue in this case has to represent a far departure from the accepted and usual course of judicial proceedings. It is respectfully submitted that such failure to act should call for supervisory action from this Court.

However, failure of the Court of Appeals for the Federal Circuit to address this issue does not prevent this Court from reaching this issue. See New York City Transit Authority, et al. v. Carl A. Beazer, et al., 440 US 568, 581 (1979).

A reference to dictionary authorities shows that there is no similarity between a radiotelegraphic receiver and a display

pager, not even the wavelength which each uses.

Radiotelegraphy deals in dots and dashes that are discernable to the human ear. "Cooke & Markus, Electronics and Nucleonics Dictionary" contains the following definition of "radiotelegraphy" in its 1978 edition at page 530:

> "radiotelegraphy Telegraphy that involves the use of radio waves in place of wire lines. The international Morse Code is generally used in radiotelegraphy"

That radiotelegraphic receivers have to have tuners to enable the operator to change frequencies because of atmospheric conditions is confirmed under the definition of "Telegraphy" in "McGraw Hill Encyclopedia of Science and Technology," 5th ed. (1985) in Vol. 11, at page 506 as follows:

> "Radio waves at these frequencies are reflected between the

> ionosphere and the surface of the Earth. Ionospheric characteristics vary from day to night, from season to season, by position of the Earth's surface, and during the 11-year sunspot cycle. The transmission frequency is chosen in accordance with prevailing ionospheric conditions."

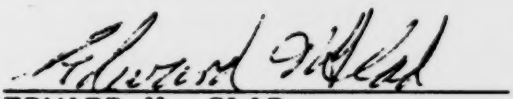
This "Encyclopedia" also states on page 504 that radiotelegraphy operates either between 3 to 30 megahertz or for frequency-shift-keying type is shifted above 400 megahertz. By contrast, the display pagers herein operate between 138 to 174 megahertz, use an encoded signal, do not have tuners or audio amplifiers, and are never bought or sold in the trade as radiotelegraphic receivers.

CONCLUSION

In order to resolve the conflicting decisions on the limitations of inferior eo nomine designations in TSUS as well as on the common meaning of "solid-state

(tubeless) radio receiver", and to supervise the lower courts in the accepted and usual course of judicial proceedings, it is respectfully urged that the present case be reversed and remanded to the trial court to determine the proper classification of the display pagers starting with whether they come within the common meaning of "radiotelegraphic reception apparatus".

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1258

NEC AMERICA, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

Decided: September 28, 1988

Edward N. Glad, Glad & Ferguson, of Los Angeles, California, argued for plaintiff-appellant.

Saul Davis, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With him on the brief were John R. Bolton, Assistant Attorney General, David M. Cohen, Director and Joseph I. Liebman, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade
Chief Judge RE

Before ARCHER, Circuit Judge, BALDWIN, Senior Circuit Judge, and MAYER, Circuit Judge.

ARCHER, Circuit Judge.

This appeal is from the judgment of the United States Court of International Trade classifying certain "paging receivers" under item 685.24 of the Tariff Schedules of the United States.

The same merchandise presented in this case was the subject of classification in NEC America, Inc. v. United States, 8 CIT 184, 596 F. Supp 466 (1984), aff'd, 760 F.2d 1295 (Fed. Cir. 1985) (NEC I). Chief Judge Re again reached the same conclusion we previously affirmed in NEC I.

We have considered the arguments of the appellant but, for the reasons

expressed in the opinion below, we conclude that the holding of NEC I was not erroneous. Accordingly, we affirm the judgment in this case.

AFFIRMED

Slip Op. 87-139

UNITED STATES COURT OF INTERNATIONAL TRADE

NEC AMERICA, INC., Plaintiff, v. THE UNITED STATES, Defendant.	Before: RE, CHIEF JUDGE Court No. 83-6-00799S

Memorandum Opinion and Order

The Customs Service classified certain imported paging receivers as "Other: Solid-state (tubeless) radio receivers: . . . . Other" under item 685.24, TSUS. The plaintiff contends that the merchandise is properly classifiable as "indicator panels, . . . and other sound or visual signalling apparatus" under item 685.70, TSUS.

Held: Since plaintiff has not introduced evidence to show that the merchandise was improperly classified, it failed to rebut the presumption of correctness, and

the paging receivers were correctly classified as "Other: Solid-state (tubeless) radio receivers: . . . . Other" under item 685.24, TSUS.

[Judgment for defendant; action dismissed.]

Decided: December 18, 1987

Glad & Ferguson (Edward N. Glad) at the trial and on the brief, for plaintiff.

Richard K. Willard, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office (Saul Davis, at the trial and on the brief), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan, and described on the customs invoice as "paging receivers."

The merchandise was classified by the Customs Service as "Other: Solid-state

(tubeless) radio receivers: . . . . Other" under item 685.24 of the Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty at a rate of 8.8 per centum ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item 685.70, TSUS, as "indicator panels, . . . and other sound or visual signalling apparatus," dutiable at the rate of 3.5 per centum ad valorem.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 6, Part 5:

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms;

all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:

. . . .

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and reception apparatus, and parts thereof:

. . . .

Other:
Solid-state (tubeless) radio receivers;

. . . .

685.24 Other . . . . . 8.8% ad val.

Claimed under:

Schedule 6, Part 5:

685.70 Bells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus, all of the foregoing which are electrical, and parts thereof. . . . . .3.5% ad val.

The question presented is whether, within the meaning of the tariff provisions, the imported merchandise is dutiable as "Other: Solid-state (tubeless) radio

receivers: . . . . Other," as classified by Customs, or as "indicator panels, . . . and other sound or visual signalling apparatus," as claimed by plaintiff. Since it is the determination of the court that plaintiff has not proven that the imported display pagers were incorrectly classified, the classification of the merchandise as "Other: Solid-state (tubeless) radio receivers: . . . . Other," under item 685.24 TSUS, is sustained.

The merchandise in the present case was the subject of prior customs litigation by the same plaintiff-importer in NEC America, Inc. v. United States, 8 CIT 184, 596 F.Supp. 466 (1984), aff'd, 760 F.2d 1295 (Fed. Cir. 1985). In that case, identical merchandise was also classified as solid-state (tubeless) radio receivers, under item 685.24 TSUS. Plaintiff there also contended that the

merchandise was incorrectly classified, and should have been classified as "indicator panels, . . . and other sound or visual signalling apparatus," under item 685.70, TSUS. After an examination of the merchandise, relevant case law, lexicographic definitions, and testimony, the court held that plaintiff failed to overcome the presumption of correctness which attached to the government's classification, and sustained the classification of the merchandise by the Customs Service. Plaintiff appeals to the United States Court of Appeals for the Federal Circuit, and the appellate court affirmed that decision on the basis of the opinion of this court. NEC America, Inc. v. United States, 760 F.2d 1295 (Fed. Cir. 1985).

The imported paging receivers are described in NEC America, Inc. v. United

States, 8 CIT 184, 596 F.Supp. 466 (1984). In sum, the pager is a small electrical device which alerts users to messages visually displayed on a panel. The pager is battery powered and has liquid crystal diode visual display (LCD) units with a 10-digit capacity. It is pre-set to a certain radio frequency channel and is activated by means of a three-motion switch. When the switch is turned, the pager emits a tone and the liquid crystal display is illuminated to indicate that it is operational.

When reset, the pager is activated by a binary digital code transmitted over the pre-set radio channel. The radio signal is received by the pager, detected, and sent to a decoding device which activates the pager. When activated, the pager generates a tone and presents numerical

information on a visual display LCD. The device converts binary information received through the radio frequency into digital information on the LCD. The pager can thereby receive information such as telephone numbers, stock quotations, or coded messages. It also has a memory capability which allows it to store and recall messages.

In NEC America, plaintiff's principal contention was that a radio receiver necessarily requires a tuner and an audio amplifier, and, therefore, the imported merchandise could not properly be classified as radio receivers because the articles did not contain either tuners or audio amplifiers. 8 CIT at 186. The court found this argument to be contrary to the common meaning of "radio receiver" as found in lexicographic authorities and

relevant case law. Id. at 186-91.

In determining whether the imported paging receivers were within the meaning of "radio receivers," as used by Congress in the tariff schedules, the court cited the well-established principle that "[t]he meaning of a tariff term 'is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary.'" Id. at 186 (quoting Bentkamp v. United States, 40 CCPA 70, 78, C.A.D. 500 (1952)). In ascertaining the common meaning of "radio receiver," the court reviewed various lexicographic authorities and relevant case law and determined that the basic functions of a radio receiver are selectivity, amplification, and detection. 8 CIT at 190. The expert testimony presented at trial by the defendant was consistent with this definition of radio

receiver. Id. at 187. In addition, both plaintiff's and defendant's experts agreed that the display pagers perform these functions.

Plaintiff, however, asserted that radio receivers must also have variable tuning and audio amplification. The court noted that the cases cited by plaintiff in support of its contention dealt with devices "designed to receive commercial radio stations that broadcast to the public at large." Id. at 189. The court held, however, that while commercial broadcast receivers would not be practical without tuners and audio amplifiers, "[t]he class of 'radio receivers,' . . . is not limited to entertainment broadcast receivers, and as an eo nomine designation, includes all forms of radio receivers." Id.

The court also considered plaintiff's contention that the merchandise should have been classified under item 685.70, TSUS, which covers electrical "[b]ells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus," and found it to be without merit. Id. at 191. After examining the prior case law, the court indicated that classification under item 685.70, TSUS, was "limited to those articles whose sole purpose and function is merely signalling." Id. Hence, the court concluded that the superior capabilities of the display pagers in issue, with their ability to display information in digital form and to retain it for later recall, clearly "transcend mere signalling." Id.

Finally, the court concluded that since the imported display pagers "select

a frequency, amplify it, and convert radio signals into perceptible signals, i.e., visual digital indications on the LCD," they perform the essential functions of a radio receiver. Id. at 190. Consequently, the court held that the display pagers were properly classified by Customs as "'solid-state (tubeless) radio receivers' under item 685.24, TSUS." Id. at 192.

In the present action, plaintiff contends that the court in NEC America was in error with respect to the classification of the imported display apgers and maintains that the display pagers are properly dutiable as "indicator panels, . . . and other sound or visual signalling apparatus," under item 685.70, TSUS. NEC again argues that the display pagers cannot properly be classified as radio receivers because they do not contain tuners or audio amplifiers,

and that radio receivers necessarily require tuners and audio amplifiers. Furthermore, NEC contends that the inferior heading of "Other: Solid-state (tubeless) radio receivers" is limited by its immediate superior heading to radiobroadcasting apparatus, pursuant to General Headnote 10(c)(i), TSUS.

In order to prevail in this action plaintiff must present clear and convincing evidence to prove that the court's decision in NEC America was erroneous. See Bar Zel Expediters, Inc. v. United States, 3 CIT 84, 90, 544 F.Supp. 868, 873 (1982), aff'd, 698 F.2d 1210 (Fed. Cir. 1983); M.L. de Lange v. United States, 76 Cust. Ct. 33, 38, C.D. 4631 (1976). If plaintiff does not show that the display pagers were improperly classified, the court must decide whether the holding of the NEC America decision

should be followed under the doctrine of stare decisis. The following statement on the application of stare decisis, found in the case of United States v. Dodge & Olcott, Inc., 47 CCPA 100, C.A.D. 737 (1960), is equally applicable here:

> While we always are open to consider any proper and pertinent matters which bear upon the issue of possible error in an earlier decision, such matters when presented must be clear and convincing. It is unfair both to the courts and to the parties litigant that there be a readjudication of issues previously determined except upon a clear and convincing showing of error. This requirement is not satisfied by a reargument of the former issues on the same or a merely cumulative record.

Id. at 103; see also Bar Zel Expediters, 3 CIT at 90, 544 F.Supp. 873.

In this case, it cannot be doubted that the plaintiff has not made a clear and convincing showing that the holding of NEC America was erroneous. NEC contends

that the tariff item for solid-state (tubeless) radio receivers does not encompass radiotelegraphic or radiotelephonic receivers, because the superior heading divides radiotelegraphic and radiotelephonic receivers from radiobroadcasting and television receivers with a semicolon. NEC submits that "the inferior heading for 'other solid-state (tubeless) receivers' is limited by its immediate superior heading to radiobroadcasting receivers," by virtue of General Interpretative Rule 10(c)(i), TSUS, which provides that an inferior heading cannot enlarge its superior heading.

NEC's interpretation of the tariff schedule is not supported by either the statutory language, or the General Interpretative Rules. It is clear from an examination of the tariff schedules that

there is only one main superior heading rather than two, as contended by NEC. Hence, item 685.24 encompasses ratiotelegraphic and radiotelephonic apparatus, as well as, radiobroadcasting apparatus. If the tariff schedules were interpreted as NEC contends, there is no inferior heading that encompasses radiotelegraphic and radiotelephonic apparatus, and, therefore, there would be no tariff item which would provide for duties on the imported paging receivers. Plaintiff's suggested interpretation of the tariff schedules would render the specification of radiotelegraphic and radiotelephonic apparatus superfluous, and violate the presumption that Congress has not used superfluous words. See Ameliotex, Inc. v. United States, 65 CCPA 22, 25, C.A.D. 1200, 565 F.2d 647, 677 (1977).

Furthermore, the main superior heading to item 685.24, cannot be interpreted as being divided into two sections by a semicolon, as this grammatical construction of the statute would "bring[] an anomalous result contrary to the manifest intention of Congress . . . ." See L.R. Markell v. United States, 16 Ct. Cust. App. 518, 520 (1929). Hence, the court must give effect to the legislative intent that the provision for "Other: Solid-state (tubeless) radio receivers: . . . . Other," item 685.24, TSUS, was to encompass all the categories of radio receivers listed in the main superior heading.

NEC again contends that the imported display pagers are not within the common meaning of "radio receiver," because that term encompasses more than just the functions of selectivity, amplification and

detection. In support of its contention NEC presented the testimony of experts who testified that a receiver which performs the functions of selection, amplification, and detection is not necessarily a solid-state (tubeless) radio receiver, as it must also have a tuner and audio amplifier. With the exception of this expert testimony, there was no other support for plaintiff's position, which was considered and rejected by the court in NEC America. Hence, plaintiff's expert testimony does not constitute a clear and convincing showing of error. It is not questioned that the opinions of experts are relevant in determining the common and commercial understanding of a tariff term. This testimony, however, is advisory only, and unsupported assertions and opinions are no more probative when reiterated than

when first offered for the consideration of the court. See Toyota Motor Sales, U.S.A., Inc. v. United States, 7 CIT 178, 183-4, 585 F.Supp. 649, 654 (1984), aff'd, 753 F.2d 1061 (Fed. Cir. 1985).

For the first time, NEC contends that radio receivers must operate on a "real time," or instantaneous basis, rather than transmit a message that has been decoded in a memory to make it perceptible to the user, as with the display pagers in the case. Apart from the opinions of NEC's experts, this contention is unsubstantiated by any authoritative source. No lexicographic definition imposes such a limit on the term radio receiver. Furthermore, as indicated by the defendant, plaintiff's position or assertion is contrary to several types of devices which are commonly considered radio receivers. The examples

given included Lotus broadcast and telegraphic radio receivers, some Telex telegraphic radio receivers, and Muzak broadcast radio receivers.

Finally, NEC asserts that the display pagers would be more appropriately classified as "indicator panels, . . . and other sound or visual signalling apparatus," because they are primarily indicator panels which signal the user. NEC submits that the memory capabilities of these display pagers are merely subsidiary functions of the device. This argument ignores the fact that, beyond the additional ability of these devices to store and recall information, the pagers communicate information from one point to another. As indicated in NEC America, these capabilities transcend the function of signalling or alerting the user of an abnormal or

or unusual circumstance. See 8 CIT at 191. Merchandise, such as the display pagers in this case, which does more than signal the user is not classifiable as "signalling apparatus." Cf. United States v. Flex Track Equipment Ltd., 59 CCPA 97, 100, C.A.D. 1046, 458 F.2d 148, 151 (1972).

In sum, NEC has not made a clear and convincing showing of error in the holding of NEC America. Although plaintiff has established a more expansive record by presenting additional expert testimony, plaintiff did not rebut the presumption of correctness of the government's classification. Moreover, defendant did not merely rely on the statutory presumption of correctness that prevails in customs classification cases. It introduced persuasive expert testimony to refute the testimony of plaintiff's witnesses, and to

prove that the merchandise was properly classified by Customs. See NEC America, Inc. v. United States, 8 CIT at 190-91, 596 F. Supp. at 471.

It is the determination of the court that the holding in NEC America is not clearly erroneous, and that under the doctrine of stare decisis, is a binding precedent in the present action. Hence, the government's classification of the display pagers as "Other: Solid-state (tubeless) radio receivers . . . . Other," under item 685.24, TSUS, is sustained. Judgment will issue accordingly.

/s/ Edward D. Re
Edward D. Re
Chief Judge

Dated: New York, New York
December 18, 1987

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-708

NEC AMERICA, INC.,
Appellants,

v.

THE UNITED STATES,
Appellee.

760 F.2d 1295

Decided: May 8, 1985

Edward N. Glad, Glad & Ferguson, of Los Angeles, California, argued for appellant.

Michael P. Maxwell, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With him on the brief were Richard K. Willard, Acting Assistant Attorney General, David M. Cohen, Director, and Joseph I. Liebman, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade

Chief Judge RE

Before BALDWIN, KASHIWA, and MILLER, Circuit Judges.

BALDWIN, Circuit Judge.

This is an appeal from a judgment of the United States Court of International Trade sustaining the classification of certain display pagers under item 685.24 of the Tariff Schedules of the United States.

The issues presented in this case were thoroughly treated in the trial court's opinion filed by Chief Judge Re, reported at 8 CIT 184, 596 F.Supp. 466 (1984). Accordingly, we affirm on the basis of Chief Judge Re's opinion.

AFFIRMED

596 F.Supp. 466

Slip Op. 84-106

UNITED STATES COURT OF INTERNATINAL TRADE

NEC AMERICA, INC.	:	
	:	Before RE,
Plaintiff,	:	CHIEF JUDGE
v.	:	
	:	Court No.
THE UNITED STATES,	:	83-3-00419
	:	
Defendant.	:	
	:	

Paging Devices

Battery-operated paging receivers which receive information transmitted over a pre-set radio frequency, emit an alerting tone, and convert the radio frequency signal through a code to visible digital information on liquid crystal diode displays, were properly classified as "Other solid-state (tubeless) radio receivers" under item 285.25 TSUS.

HELD: Since the imported devices perform the three essential functions of a radio receiver, i.e., selectivity, amplification,

and detection, and receive and convert radio waves into perceptible signals, they fall within the accepted definition of radio receivers.

[Judgment for defendant.]

Decided September 25, 1984

Glad, White & Ferguson (Edward N. Glad at the trial and on the brief), for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Office, Commercial Litigation Branch (Michael P. Maxwell at the trial and on the brief), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan, and described on the customs invoice as "paging receivers."

The merchandise was classified by the Customs Service as "other solid-state (tubeless) radio receivers" under item 685.24 of the Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty at a rate of 8.8 per centum ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item 685.70, TSUS, as "indicator panels and other sound or visual signalling apparatus" dutiable at a rate of 3.5 per centum ad valorem.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 6, Part 5:

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission

and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:

. . .

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and reception appartus and parts thereof:

. . .

Other:

Solid-State (tubeless) radio receivers:

. . .

685.24 Other . . . . . 8.8% ad val.

Claimed under:

Schedule 6, Part 5:

685.70 Bells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus, all of the foregoing which are electrical, and parts thereof . . . . . .3.5% ad val.

The question presented is whether, within the meaning of the tariff provisions, the imported merchandise is dutiable as "other solid-state (tubeless) radio receivers," as classified by Customs, or as "indicator panels and other sound or visual signalling apparatus," as claimed by plaintiff. In order to decide this issue, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." Jarvis Clark Co.

v. United States, 733 F.2d 873, 878, reh'g denied. No. 83-1108 (Fed Cir. July 17, 1984).

After an examination of the merchandise, relevant case law, lexicographic definitions, and testimony of record, it is the determination of the court that the plaintiff has not overcome the presumption of correctness that attaches to the government's classification. 28 U.S.C. § 2639(a)(1) (1982); Jarvis Clark Co. v. United States, 733 F.2d 873, 876, reh'g denied, No. 83-1108 (Fed. Cir. 1984); E. R. Hawthorne & Co. v. United States, 730 F.2d 1490, 1490 (Fed. Cir. 1984).

The imported paging receivers are small electrical devices which are pre-set to a certain radio frequency channel. The pagers are battery-powered and have liquid crystal diode visual display (LCD) units

with a ten digit capacity. They are activated by means of a 3-motion switch. When the switch is turned, the pager emits a tone and the liquid crystal display is illuminated to indicate that it is operational.

When reset, the pager is activated by a binary digital code transmitted over the pre-set radio channel. The radio signal is received by the pager, detected, and sent to a decoding device which activates the pager. When activated, the pager generates a tone and presents numerical information on a visual display LCD. The device converts binary information received through the radio frequency into digital information on the LCD. The pager can thereby receive information such as telephone numbers, stock quotations, or coded messages. It also has a memory capability

which allows it to store and recall messages.

In attacking the Customs Service's classification of the paging receivers, it is plaintiff's principal contention that a radio receiver necessarily requires a tuner, that is, a device that enables the user to select more than one frequency, as well as an audio amplifier.

In order to determine whether the imported paging devices are radio receivers, the court must ascertain the precise meaning of "radio receivers," as used by Congress in the tariff schedules. The meaning of a tariff term "is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary." Bentkamp v. United States, 40 CCPA 70, 78, C.A.D. 500 (1952), quoted with approval in Rohm & Haas Co. v.

United States, 727 F.2d 1095, 1097 (Fed. Cir. 1984). It is well established that the "common meaning of a tariff term is not a question of fact but a question of law." Schott Optical Glass, Inc. v. United States, 67 CCPA 32, 34, C.A.D. 1239, 612 F.2d 1283, 1285 (1979).

The tariff schedules are written in the language of commerce, and the terms used are to be given their commercial or common meaning. See Ameliotex, Inc. v. United States, 65 CCPA 22, 25, C.A.D. 1200, 565 F.2d 674, 677 (1977); Esco Mfg. Co. v. United States, 63 CCPA 71, 73, C.A.D. 1167, 530 F.2d 949, 951 (1976). Accordingly, the court must examine the lexicographic definitions, as well as the testimony given at trial, to determine whether the paging devices are radio receivers.

"Radio receiver," as used in item 685.24, is an eo nomine designation. In the absence of a demonstrated legislative intent to the contrary, an eo nomine designation of an article will include all forms of the article. See, e.g., Pistorino & Co., Inc. v. United States, 82 Cust. Ct. 168, 177, C.D. 4799 (1979), quoting Nootka Packing Co. v. United States, 22 CCPA 464, 470, T.D. 47464 (1935). It must also be remembered that the tariff statutes were enacted "not only for the present but also for the future, thereby embracing articles produced by technologies which may not have been employed or known to commerce at the time of the enactment . . . ." Corporacion Sublistatica, S.A. v. United States, 1 CIT 120, 126, 511 F. Supp. 805, 809 (1981); see also Davies Turner & Co. v. United States, 45 CCPA 39,

41, C.A.D. 669 (1957).

In the McGraw-Hill Encyclopedia of Science and Technology, Vol. 11 (5th ed. 1982), radio receiver is defined as "[t]hat part of a radio communication system which abstracts the desired information from the radio frequency (rf) energy collected by the antenna. All radio receivers must perform three basic functions: selectivity, amplification, and detection." Id. at 282.

The Institute of Electrical and Electronics Engineers Standard Dictionary of Electrical and Electronics Terms (2nd ed. 1977) defines radio receiver as a "device for converting radio-frequency power into perceptible signals." Id. at 554.

Radio receiver is defined in Cooke & Markus, Electronics and Nucleonics Dictionary (1960) as a device "that converts

radio waves into intelligible sound or other perceptible signals." Id. at 380.

At trial, plaintiff offered the testimony of Mr. Michael J. McLaughlin, its Manager of Pager Engineering. Mr. McLaughlin has been employed by the plaintiff for six years since his discharge from the Air Force, and holds a third-class F.C.C. license with broadcast endorsement. Although he has taken some courses in radio communications, Mr. McLaughlin does not have a college degree and is not a member of any professional organization in the radio communications industry. On cross-examination, he testified that a radio receiver is a device "which has external tunability, receives radio frequency, and detects them, and puts them through an audio amplifier to an audio output of some type." Although Mr. McLaughlin took issue

with most of the lexicographic definitions read to him, he agreed that the paging receivers perform the functions of selection, amplification, and detection, as those terms are defined by the McGraw-Hill Encyclopedia of Science and Technology.

Mr. Gerald M. LeBow, owner of Technical Marketing Consultants, Inc., a company that provides technical marketing and sales information pertaining to the consumer and professional electronics industries, testified for the government. He has extensive and varied experience in the radio broadcasting industry and is a member of a number of professional or trade associations. In addition, he has written papers on radio technology and has a first-class radio telephone license and an amateur radio license from the F.C.C. Mr. LeBow defined radio receiver as a

device which performs selection, amplification and detection, and stated that the pagers perform all three of these functions. He further testified that, in his opinion, the receiving pagers would be considered radio receivers within the radio communications industry.

Selectivity is defined as the ability to select a particular frequency from the many radio signals in the atmosphere. The paging devices that are the subject matter of this action perform this function. They are pre-set to receive a particular frequency.

Amplification is the process of increasing the radio frequency energy received by the antenna so that it can be used to generate a signal. Both parties admit that the display paging receivers

perform this function.

Detection is the process whereby the radio frequency waves are converted into a signal that can be utilized. The paging units convert radio frequency input, in the form of a binary code, into output in the form of a digital display on the LCD.

Mr. McLaughlin, plaintiff's witness, acknowledged that the paging device performed the three essential functions of selectivity, amplification, and detection. He testified, however, and the plaintiff contends, that a radio receiver must also have a tuner and an audio amplifier. In support of this contention, the plaintiff cites Audiovox Corp. v. United States, 1 CIT 136, 141 (1981). In Audiovox, plaintiff challenged the classification of imported FM converters as solid-state (tubeless) radio receivers designed for motor vehicle

installation under item 685.24 of the tariff schedules. The converters were used to adapt motor vehicle AM radios so as to permit FM reception.

The Audiovox court found that "[t]he sole function of the FM converter is to receive and then convert FM radio signals into AM radio wave signals." Id. at 142. In normal use, the converters could not produce an audio signal by attachment to a loudspeaker. Emphasizing that the converter by itself would be "commercially impractical for use as a radio receiver," the court found that the converters were merely accessories to existing AM receivers in motor vehicles, and not "radio receivers" unto themselves. Id. at 143. The holding in Audiovox was limited to radio receivers designed for automobile installation which, as the court found, must have audio

capability to be commercially practical.

In Symphonic Electronics Corp. v. United States, 72 Cust. Ct. 211, C.D. 4543 (1974) (Symphonic I), AM/FM tuners were classified under item 685.23 as "solid-state (tubeless) radio receivers." Id. at 213. Plaintiff claimed that the tuners were "more than" a radio receiver since they were to be used in combination with a phonograph and tape player. The court determined that the common meaning of radio receiver included "tuner-amplifiers which, in addition to receiving radio signals . . ., are capable of controlling and amplifying signals from a record changer and tape player connected by wires to the tuner-amplifier." Id.at 217.

In Symphonic Electronics Corp. v. United States, 77 Cust. CT. 147, C.R.D.

76-5 (1976) (Symphonic II), the court had before it merchandise that was "the same in all material respects" as that considered in Symphonic I. On cross-motions for summary judgment, plaintiff alleged that radio chassis were improperly classified as radio receivers because they were lacking a cabinet and loudspeaker, which were urged to be the essential components. The Symphonic II court held that there existed a triable issue "concerning the essential components of a radio receiver, as that term is commonly understood in the electronics industry; and concerning whether a stereo 'chassis' or tuner-amplifier of the type represented by the Model R860 was commonly regarded and sold within the trade as a 'radio receiver.'" Id. at 153.

All the foregoing cases dealt with products or components of systems designed

to receive commercial radio stations that broadcast to the public at large. The factual context of the present case is quite different. To be commercially practical, a receiver designed for commercial entertainment broadcasts requires a tuner in order to select among the frequencies of various radio stations. The class of "radio receivers," however, is not limited to entertainment broadcast receivers, and as an eo nomine designation, includes all forms of radio receivers.

At trial, there was uncontradicted expert testimony that other types of radio receivers, such as industrial receivers for use by police and fire departments, or taxis, or "Musak" receivers, are pre-set to one frequency, and have no variable tuning capability. Similarly, commercial broadcast receivers, of course, are designed

with an audio capability. Again, however, the class of "radio receivers" is broader than simply commercial broadcast receivers.

There was testimony that other types of radio receivers emit signals other than audio signals. For example, receivers, in radar systems convert radio signals into visual, rather than audio, signals. In addition, utility load management systems and remote control devices convert radio frequency into coded control signals without an audio output. Moreover, the lexicographic definitions do not limit output to sound or audio signals, but refer to "perceptible signals." Thus, a careful reading of Audiovox, Symphonic I, and Symphonic II reveals that those cases are limited to devices designed to receive radio broadcasts transmitted to the public at large.

In the most recent case on point, General Electric Co. v. United States, 2 CIT 84, 525 F.Supp. 1244 (1981), aff'd, 69 CCPA 166, 681 F.2d 785 (1982), plaintiff challenged the classification of three types of electronic packs (chassis) as unfinished solid-state (tubeless) radio receivers. Plaintiff argued that, since the chassis were missing significant parts such as a power transformer, power cord, and loudspeaker, the chassis were inoperable as radio receivers and, thus, improperly classified. Defendant argued that the classification was proper since "the chassis were capable of performing the basic functions of a 'radio receiver' within the common meaning of that term." Id. at 87, 525 F.Supp. at 1246. Therefore, the General Electric court stated that "central to the dispute between the parties is a

determination of the common meaning of the term 'radio receiver.'" Id. at 90, 525 F. Supp. at 1248. The court reviewed the pertinent lexicographic definitions and relevant case law and determined that "the basic functions of a radio receiver are selection, amplification and detection." Id. Accordingly, the chassis were held to be unfinished radio receivers as classified by Customs. On appeal, adopting the opinion authored by Judge Newman for the Court of International Trade, the United States Court of Customs and Patent Appeals affirmed. 69 CCPA 166, 167, 681 F.2d 785, 786 (1982).

This Court agrees with the holding in General Electric Co. v. United States, 2 CIT 84, 525 F.Supp. 1244 (1981), aff'd, 69 CCPA 166;, 681 F.2d 785 (1982) in which the court defined the basic functions of a radio receiver as selectivity, amplification,

and detection. The paging receivers here are self-contained units that select a frequency, amplify it, and convert radio signals into perceptible signals, i.e., visual digital indications on the LCD.

It is also significant to note that the plaintiff's marketing literature, operations and service manuals, invoices and its personnel regularly refer to various display pagers as paging receivers. For example, one N.E.C. service manual describes a similar device as "an all solid state double superheterodyne FM receiver." While such descriptions are not conclusive, they are relevant evidence of industry usage, particularly when they contradict the plaintiff's present position in this litigation. See Lukas American, Inc. v. United States, 7 CIT ____, slip op. 85-55, at 5 (May 24, 1984); Nomura (America) Corp.

v. United States, 62 Cust Ct. 524, 532-33, C.D. 3820, 299 F.Supp. 535, 542 (1969), aff'd, 58 CCPA 82, C.A.D. 1007, 435 F.2d 1319 (1971).

Expert testimony as to the common meaning of a tariff term is, of course, merely advisory. E.g., Package Machinery Co. v. United States, 41 CCPA 63, 66, C.A.D. 1200 (1977). It is, however, considered probative when supported by lexicographic and technical sources. In this case, the court finds the testimony of Mr. LeBow, the defendant's expert, both credible and persuasive. Mr. LeBow had sound academic credentials, and wide-ranging, practical experience in the radio industry. On the other hand, even apart from academic training, Mr. McLaughlin's experience is limited to working with non-commercial radio equipment in the Air Force and the

California Air National Guard, and his civilian experience with the plaintiff. Mr. McLaughlin seemed to be straining at times, and was forced to quibble or disagree with the definitions read to him. For example, he testified that a radio receiver must directly convert radio signals, rather than convert them indirectly as the paging receivers do. There is no support for this assertion in any of the sources cited. It is well established that conclusory statements by a witness which are based solely on his own opinion have little or no probative value. See, e.g., Keer, Maurer Co. v. United States, 46 CCPA 110, 115, C.A.D. 710 (1959); Schott Optical Glass, Inc. v. United States, 82 Cust. Ct. 11, 22-23, C.D. 4783, 468 F. Supp. 1318, 1325, aff'd, 67 CCPA 32, C.A.D. 1239, 612 F.2d 1283 (1979).

Mr. LeBow was forthright and straightforward in his testimony, and his opinions were supported by lexicographic and scientific sources. In short, the defendant did not simply rely on the statutory presumption of correctness. Rather it has submitted competent, reliable and credible affirmative evidence, which the court has found persuasive, to support the Customs Service's classification of the imported merchandise. See Schott Optical Glass, Inc., supra, 82 Cust. Ct. at 24, 468 F. Supp. at 1326; Ameliotex, Inc. v. United States, 77 Cust. Ct. 72, 84, C.D. 4673, 426 F.Supp. 556, 564 (1976), aff'd, 65 CCPA 22, 565 F.2d 674 (1977).

The court has considered the plaintiff's contention that the merchandise should be classified under item 685.70, TSUS, which covers electricl "[b]ells,

sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus," and finds it without merit.

It is axiomatic that merchandise which constitutes more than a particular article is not classifiable as that article. E.g., United States v. Flex Track Equipment Ltd., 59 CCPA 97, 100, C.A.D. 1046, 458 F.2d 148, 151 (1972); E. Green & Son (New York), Inc. v. United States, 59 CCPA 31, 34, C.A.D. 1032, 450 F.2d 1396, 1398 (1971). As the Court of Customs and Patent Appeals stated, the rules applying to the "more than" doctrine are general, and "each case must in the final analysis be determined on its own facts." E. Green & Son (New York), Inc. v. United States, supra, 59 CCPA at 34, 450 F.2d at 1398.

The display paging receivers clearly perform more than a signalling function.

Indeed, the device's primary marketing feature that distinguishes it from the tone-only pager, is its superior communication capability. Clearly, signalling is one form of communication and a great many products or articles of commerce are capable of signalling in some way or another. Classification under item 685.70, TSUS, as "other visual or sound signalling apparatus," however, is limited to those articles whose sole purpose and function is merely signalling. This court has held that "other sound or visual signalling apparatus" must "call attention to temporary or abnormal conditions," Oxford Int'l Corp. v. United States, 75 Cust. Ct. 58, 68, C.D. 4608 (1978); see Amersham Corp. v. United States, 5 CIT____, 564 F.Supp. 813, 825 (1983), or to "a special circumstance," A & A International, Inc. v. United States,

5 CIT ____, Slip op. 83-42, at 12 (1983).

The capabilities of the imported paging receivers, however, transcend mere signalling. The information that can be received is not limited to temporary or abnormal conditions, or any set of special circumstances. Rather, the device has the capacity to receive any information that can conceivably be reduced to digital form. In addition, the product's ability to store and recall messages also constitutes something more than a signalling function. Thus, a careful analysis of the receiver's capabilities clearly indicates that the article is not properly classifiable under 685.70, TSUS.

Since the imported paging receivers perform the functions of selectivity, amplification and detection, and convert radio waves into perceptible signals, they fall

within the accepted definition of radio receivers. It is, therefore, the determination of the Court that the presumption of correctness that attaches to the government's classification has not been overcome.

Since the Court holds that the paging receivers are properly classified as "other solid-state (tubeless) radio receivers" under item 685.24 of the tariff schedules, plaintiff's claim is denied and the action is dismissed. Judgment will issue accordingly.

/s/ Edward D. Re
Edward D. Re
Chief Judge

Dated: September 25, 1984
New York, New York

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1258

NEC AMERICA, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES
Defendant-Appellee.

JUDGMENT

ON APPEAL FROM THE UNITED STATES COURT OF INTERNATIONAL TRADE

in CASE NO(S). 83-6-00799S

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

DATED SEP 28 1988

Costs: Against, Appellant.

PRINTING----------$418.56

TOTAL----------$418.56

ISSUED AS A MANDATE: OCT 19 1988